

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]
MISCELLANEOUS CAUSE NO. 153 OF 2022

**THE REGISTERED TRUSTEES
OF THE CHURCH OF UGANDA=====APPLICANT**

VERSUS

- 1. THE COMMISSIONER LAND REGISTRATION**
- 2. POLINA ESTATES LIMITED=====RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for judicial review by way of Notice of Motion under Sections 33 and 36 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Rules 3, 4, 6 7 and 8 of the Judicature (Judicial Review) Rules, S.I. No.11 of 2009, for orders for judicial relief(s) for;

- 1. An Order of Certiorari doth issue to quash the decision of the 1st Respondent dated 31st May 2022 requiring a sub division of the land comprised in the applicant's freehold certificate of title for land comprised in Freehold Register Volume 220 Folio 24 Plot 21 Akii Bua Road, Kampala to be carried out to create a separate plot in favour of the 2nd respondent either voluntarily by the applicant surrendering its certificate of title and executing mutation forms or by consequential order of the 1st respondent.*
- 2. An order of mandamus doth issue requiring the 1st respondent to forthwith cancel the illegal certificate of title in respect of the land comprised in Leasehold Register Volume 2501 Folio 25 Plot M180 Off Akii Bua Road, Kampala.*
- 3. An order of mandamus doth issue requiring the 1st respondent to enter the correct area in the applicant's title as 0.558 hectares.*

The grounds upon which the application is set are laid out briefly in the Notice of Motion, and expounded upon in the affidavits of Reverend Canon John Awodi and Naboth Muhairwe but in brief is as follows.

1. In the year 1974, the then President of the Republic of Uganda, the late Field Marshal Idi Amin Dada, donated to the Church of Uganda freehold land measuring approximately 0.558 hectares comprised in Plot 21 Stanley Road. The land was registered in the name of Uganda Land Commission under a certificate of title comprised in Freehold Register Volume 220 Folio 29 Plot 21 Stanley Road (currently called Akii-Bua Road).
2. The Church of Uganda entered into possession of the land but the property was not transferred into the applicant's name. On the 18th October 2006 the whole of the title for the property was registered in the name of the applicant as the body corporate under which the Church of Uganda holds property pursuant to a Vesting Order made by the 1st respondent. The Vesting Order was registered under Instrument Number 372477. The certificate of title however did not show on its face the size or acreage of the property and in the year 2018 the applicant through its lawyers requested the 1st respondent to indicate on the certificate of title the correct size of 0.558 hectares.
3. The 1st respondent however indicated a size of 0.301 hectares instead of 0.558 hectares stating that part of the land described as Plot M.180 had been leased by the Uganda Land Commission to the 2nd respondent's predecessor in title one Hon. Tarsis Kabwegyere. Upon carrying out a private survey of the property through a private surveyor the applicant confirmed that the correct size of the property described as Plot 21 Akii-Bua Road on the ground was 0.558 hectares and subsequently requested the Minister for Lands, Housing and Urban development seeking her intervention to have the correct size of land shown in the applicant's title. A report by the Commissioner for Surveys & Mapping showed that according to the records available in the Department of Surveys and Mapping, deed plans for Plot M180 have never been issued in the Department of Surveys and Mapping nor were any Instructions for Survey altering the original dimension and acreage of plot 21 Stanley Road issued.
4. The report further concluded that the original dimensions and acreage plot 21 Akii Bua Road measuring 0.558 hectares should be reinstated

and that plot M180 should be erased from the cadastral map. The Minister wrote to the 1st respondent notifying him of the Report from the Commissioner for Surveys & Mapping and instructed the 1st respondent to implement the report which required that the original dimensions of the land be reinstated and the Plot M.180 be erased from the cadastral map. The 1st respondent conducted a public hearing attended by the applicant and the 2nd respondent but in the absence of the 1st respondent. After the close of the public hearing, the 1st respondent sought for and relied on documents from Uganda Land Commission in respect of the purported lease granted to the 2nd respondent. In his ruling, the 1st respondent confirmed that the 2nd respondent's certificate of title was created erroneously without proper subdivision of the land and that the freehold certificate of title that was registered in the applicant did not have the purported lease of the 2nd respondent noted on it as an encumbrance.

5. The 1st respondent nonetheless ruled that the applicant should surrender its title for cancellation for the land to be subdivided to correctly create a freehold title for the 2nd respondent and enable the same register a freehold title derived out of conversion of its lease. The applicant filed this application for judicial review of the decisions of the 1st respondent.

The 2nd respondent filed an affidavit reply through its Managing Director Charles Mbire contending as follows;

- 1) Before independence and shortly after the independence of Uganda, the Colonial Government and later the Government of Uganda at the time built many pool houses for its senior civil servants in various towns of Uganda including in Kampala and particularly in Nakasero as is relevant to this case.
- 2) One such house was a storied building which was occupied by among others, the Inspector General of Police during Idi Amin's Government, the Permanent Secretary of the Ministry of Agriculture, and it was later allocated to Prof. Tarsis Kabwegyere as an employee of Government, in 1987.
- 3) Pursuant to Government's policy to divest its real estate portfolio to government servants as sitting tenants, the said house was divested to Hon. Prof. Tarsis Kabwegyere as a sitting tenant in 1994 where he lived

for a couple of years before he sold it to Mr. Charles Mbire, the 2nd Respondent's predecessor in title in 1998.

- 4) In the process of allocating the said property to Prof. Kabwegyere, the property kept being described differently in different letters by the different Government officials that handled its allocation and divesture. The various correspondences on record shows that the Property in dispute was described as "**Plot No. 21A Akii Bua Road**" in a letter dated 6 August 1987 by the Permanent Secretary of the Ministry of Public Service, as "**Plot No. 21B Akii Bua Road**" in a letter by the Commissioner for Lands dated 31 July 1995, and as "**Plot M180 off Akii Bua Road**" by letter dated 3 January 1996 from the Public Service Houses Sale Committee.
- 5) On 22 July 1996, Honorable Prof. Tarsis Kabwegyere applied for and was granted a leasehold certificate of title over the land on which the said house stood, described as **LRV 2501 Folio 24 Plot M180 Off Akii-Bua Road, Nakasero**. The said lease measures a total of 0.257 hectares and was created over a portion of freehold land then owned by Uganda Land Commission on behalf of Government, comprised in **FRV 220 Folio 9 Plot 21 Akii-Bua Road, Nakasero**.
- 6) In 1998, Mr. Charles Mbire purchased the land and property comprised in **LRV 2501 Folio 24 Plot M180 Off Akii-Bua Road, Nakasero** from Hon. Prof. Kabwegyere and transferred the title into his name. He then demolished the house and constructed another house and wall fence on the land as evidenced by **attachment 15 to Annexure A** to the 2nd Respondent's affidavit in reply. Subsequently, Mr. Charles Mbire transferred the title to the land into the names of the 2nd Respondent – on 16 April 2002.
- 7) On 18 October 2006, subsequent to the land transactions above and long after the 2nd Respondent had been registered as the proprietor of **LRV 2501 Folio 24 Plot M180 Off Akii-Bua Road**, the Applicant applied for a vesting order for a "**property**" which it stated that the Government of Uganda, through President Idi Amin, gave it as a gift. This property neighbours the property occupied by Prof. Kabwegyere which was now in the names of the 2nd Respondent.

- 8) At no point did the Government donate to the Church freehold land measuring 0.558 hectares comprised in Plot 21 Stanley Road as submitted by the Applicant in paragraph 2 of its submissions. What was donated to the Church was one of the two houses on the land which it took possession of in 1974. The Church was never, and has never been in possession of the second property or the entire piece of land. It is clear in the vesting order application that the Applicant applied for **property**, and not “**properties**”, to be vested into its name under section 78 of the Registration of Titles Act Cap 230 on account of its long and undisturbed occupation of the **property** since 1974.
- 9) The property was indeed vested in the Applicant for no valuable consideration, and a certificate of title to land described as **FRV 220 Folio 9 Plot 21 Akii-Bua Road** was registered in the names of the Applicant on 18 October 2006. This title did not indicate the acreage of the land.
- 10) What Government actually gave the Applicant was a house within a wall fence and the land on which it stands, and which the Applicant in its application for a vesting order specifically stated that the Church had been occupying for very many years. This wall-fenced land occupied by the Applicant, neighbors the land owned by the 2nd Respondent, and the two parties have always lived in harmony on their respective adjoining pieces of land without any boundary dispute or any allegation of encroachment on either party’s land.
- 11) In 2010, the 2nd Respondent sought to convert its leasehold interest into freehold tenure. It accordingly applied to Uganda Land Commission for conversion of the land described as **LRV 2501 Folio 24 Plot M180 Off Akii-Bua Road, Nakasero** into freehold. This application was considered and approved by Uganda Land Commission and the 2nd Respondent started the conversion process.
- 12) In 2012, while undertaking the said conversion, the 2nd Respondent was notified by the office of the 1st Respondent that it couldn’t proceed to grant a freehold title to the 2nd Respondent because there already existed a freehold title from which the land – the subject of the leasehold title – was “**subdivided**”.

13 On receipt of this communication, the 2nd Respondent commissioned a surveyor to open the boundaries of its property to ascertain the status of the land. The survey revealed an overlap of **Plot 21 Akii-Bua Road** into **Plot M180 Off Akii-Bua Road**, and confirmed that although there was no physical encroachment by either occupant of the two adjoining pieces of land, Uganda Land Commission had omitted to take the following essential steps:

- i. When Uganda Land Commission granted a lease over **Plot M180 Off Akii-Bua Road** to Hon. Prof. Kabwegyere in 1996, it inadvertently omitted to subdivide the freehold land title described as **FRV 220 Folio 9 Plot 21 Akii-Bua Road, Nakasero** then as ought to have been done, so as to create two titles – one being where the house of the Applicant is located and the other where the 2nd Respondent's land is located.
- ii. Secondly, the land described as **LRV 2501 Folio 24 Plot M180 Off Akii-Bua Road, Nakasero** should have been registered on the subdivided freehold title as an encumbrance against the freehold land that was owned by the Uganda Land Commission. Unfortunately this important registration process was also not done.
- iii. As a result, the 1st Respondent while vesting the house to the Applicant as a gift from the Government inadvertently vested the whole of Uganda Land Commission's interest on the land to the Applicant, including the reversionary interest over which it had already created a lease in favor of Hon. Prof. Kabwegyere in 1996.

14 At no point did the Applicant occupy both properties to entitle it to be vested with the whole of **Plot 21 Akii-Bua Road**. On the contrary, the 2nd Respondent's predecessor in title has the occupation permit which was issued to him after he broke down and rebuilt the house previously occupied by Prof. Kabwegyere as proved by the 2nd Respondent's affidavit in reply.

15 On ascertaining these facts, the 2nd Respondent through its lawyers brought this situation to the attention of the Applicant and also asked the Applicant to allow the 2nd Respondent to subdivide and regularize the co-existence of both properties since the parties had lived in harmony all these years.

16 The 2nd Respondent explained to the Applicant that the 1st Respondent had made a mistake and vested all the land that fell under the main title described as **FRV 220 Folio 9 Plot 21 Akii-Bua Road, Nakasero** into the name of the Applicant without subdividing the land for which Uganda Land Commission had granted a lease to Prof. Kabwegyere in 1996, being **LRV 2501 Folio 24 Plot M180 Off Akii-Bua Road, Nakasero**.

17 It was also explained to the Applicant that the church could only apply for the vesting of land or property for which it had been in occupation, and whereas the Applicant had indeed applied for the “**property**” and not “**properties**” it occupied, the 1st Respondent had inadvertently vested in it the freehold title over even the 2nd Respondent’s neighboring property comprised in **Plot M.180 Off Akii Bua Road**.

18 However, rather than cooperate to resolve the anomaly, the Applicant has desperately capitalized on the mistake of the Uganda Land Commission to try and claim ownership of the whole freehold land over which the two properties are located.

The 1st respondent filed an affidavit in reply through *Bigiira Johnson-Acting Assistant Commissioner Land Registration* contending that the applicants assertions have no legal bearing and the decision was not solely based on documents from Uganda Land Commission and that the decision would not have been any different without those documents.

ISSUES for Determination

The following issues were raised by the applicants counsel for determination.

- 1. Whether the 1st respondent acted illegally and irrationally when he disregarded and or failed to implement the investigation report of the Commissioner for Surveys and Mapping as directed by the Minister for Lands, Housing and Urban Development, failed to reinstate the original dimensions and acreage of Plot 21 Akii Bua Road and erase Plot M.180 from the cadastral map?***

2. Whether the 1st respondent acted illegally, irrationally, without jurisdiction and with procedural impropriety during the public hearings and in arriving at a wrong decision?

3. What remedies are available to the parties?

The Applicant was represented by **Counsel George Arinaitwe & Micheal Byamukama**, while the 1st respondent was represented by **Kafureeka Victor Jagaine** and 2nd respondent was represented by **Counsel Nicholas Ecimu & Joseph Luswata**.

DETERMINATION

Whether the 1st respondent acted illegally and irrationally when he disregarded and or failed to implement the investigation report of the Commissioner for Surveys and Mapping as directed by the Minister for Lands, Housing and Urban Development, failed to reinstate the original dimensions and acreage of Plot 21 Akii Bua Road and erase Plot M.180 from the cadastral map?

The applicant's counsel submitted that the Commissioner for Land Registration in his ruling dated 31st May 2022 relied on the survey report which was made vide an Internal Memo dated 14th December 2020 stated that he had analysed the records of his department and established that plot 21 Stanley Road Nakasero Kampala had an area measuring 0.558 hectares. He further stated that the name of the road was changed to Akii Bua Road. The Commissioner Surveys and Mapping further stated that ;

- no instruction to survey altering the original dimension of the plot 21 Stanley Road had ever been issued at the Department.
- Deed plans for plot M.180 have never been issued in the Department of Surveys and Mapping.

In conclusion he stated that ***“the original dimension and acreage plot 21 Akii Bua Road measuring 0.558 hectares should be reinstated. This implies that plot M.180 should be erased from the cadastral map.”***

Subsequently on the 5th January 2021 by a Inter Office Memorandum addressed to the Acting Commissioner Land Registration, the Honourable Minister for Lands, Housing and Urban Development **directed** the 1st

respondent to **expeditiously** take appropriate action **in accordance with the report of the Commissioner Surveys and Mapping** and report back.

Counsel for the applicant submitted that the directive of the Minister was explicit and required the 1st respondent to implement the conclusion of the Commissioner Surveys and Mapping that the original dimension and acreage plot 21 Akii Bua Road measuring 0.558 hectares should be reinstated and that plot M.180 should be erased from the cadastral map.

It was the contention of the applicant that the 1st respondent did not have wide discretion in the matter because it is related to a technical matter and went to the root of whether a certificate of title had been lawfully issued. This did not relate to issues of possessory rights of either the applicant or the 2nd respondent. This was a matter of ensuring that the register was properly maintained and titles lawfully issued. There was no complaint filed by the 2nd respondent regarding the applicant's title and the 1st respondent was moved by the Minister to act on the illegally or erroneously issued leasehold title and to correct the acreage for Plot 21.

It was illegal for the 1st respondent to exceed his powers, disregard the findings of the Commissioner Surveys and Mapping in respect of and to fail to cancel a title that had been entered in the register illegally or in error.

The 2nd Respondent's counsel submitted that the Applicant cannot purport to guide the 1st Respondent on what documents should have been relied on or on whose instructions the 1st Respondent should have acted to reach the Applicant's desired result. In the exercise of its functions to rectify the Register, recall and / or cancel certificates of title issued in error or containing misdescriptions, the 1st Respondent is guided by the provisions of **Section 91** of the **Land Act Cap 227** and is not subject to or bound by the instruction of the Minister of Lands or the reports of the Commissioner Surveys and Mapping.

Secondly the 1st Respondent is by law a repository of all information relating to land in Uganda and both the 1st Respondent and the Uganda Land Commission are entities which are entirely under the Ministry of Lands, Housing and Urban Development, so the 1st Respondent could rely on all or any source documents that created these land interests, including the Uganda Land Commission source files, especially given that all the submissions heavily pointed to there having been problems in the maintenance of records that caused the problem that was brought to the 1st Respondent's attention.

However, the 1st Respondent's statutory obligations in exercising its functions under **Section 91** of the **Land Act** are to allow the parties an opportunity to be heard and to give reasons for the decision it reaches. The 1st Respondent exercises these functions independently and is expected to reach its decision based on the law and evidence before, it including that adduced at the hearing.

The 2nd respondent's counsel submitted that the 1st Respondent could not simply 'implement' the investigation report of the Commissioner for Surveys and Mapping as directed by the Minister for Lands when doing so would involve cancelling the certificate of a registered proprietor alleged to have been issued in error. The investigation report by the Commissioner Surveys and Mapping was only one of the pieces of evidence that the 1st Respondent was presented with and was obliged to consider, and the 1st Respondent gave due consideration to it as seen at page 23 of his ruling wherein he stated thus:

"Furthermore, I am of the considered opinion that the report from Commissioner Surveys and Mapping (attachment 10) was with due respect made based on survey records, without taking into account all the facts, and particularly without looking at all the files and correspondences like I have had the opportunity to do, in the course of the hearings and submissions in this matter. Therefore, with great respect to my senior colleague the Commissioner Surveys and Mapping, I think his report should be revisited, especially after he looks at all the documents pertaining to these two parcels of land."

The 1st Respondent went on to note that the mistake of not subdividing Plot 21 Akii-Bua Road at the time when Uganda Land Commission granted a lease to Prof. Kabwegyere in 1995 should not be visited on Prof. Kabwegyere or his successors in title because he demonstrated diligence, particularly when he raised the matter and asked Uganda Land Commission to instruct the Commissioner Surveys and Mapping to subdivide the land and was informed that such subdivision was unnecessary.

So the same Commissioner Surveys and Mapping who claims that the surveys for **LRV 2501 Folio 24 Plot M180 Off Akii-Bua Road, Nakasero** was inappropriately done, actually went ahead to issue deed prints for the conversion of the same lease into a freehold. How then could he do that? In addition counsel argued that the vesting of **FRV 220 Folio 9 Plot 21 Akii-Bua**

Road, Nakasero to the Applicant was both illegal and procedurally improper to the extent that: It was done under **section 78** of the **Registration of Titles Act** which applies when a party proves adverse possession of land. The application was granted in contravention of the required gazetting and notice procedure under **sections 78 – 83** of the **Registration of Titles Act** which requires that the application be advertised in the gazette and notice be posted on the property for **three months** before the land can be vested if no caveat has been lodged to challenge the grant.

The whole of **FRV 220 Folio 9 Plot 21 Akii-Bua Road, Nakasero** was vested in the Applicant on the basis of adverse possession and yet the Applicant did not and has still not proved possession of the entire piece of land, particularly the 2nd Respondent's property for which the 2nd Respondent proved the possession of its predecessor in title and its own possession by photographs of the redevelopment of the plot as well as his occupation permit.

The 2nd respondent's counsel submitted that the 1st respondent faced with the above contradicting facts and evidence, it was only imperative for the 1st Respondent to consider all the available evidence before reaching a decision that would have the effect of affecting the interests of registered proprietors of land, rather than merely adopting the 'directive' of a single party or a report that was arrived at with limited facts as has been demonstrated.

Analysis

Lawfulness thus stands at the core of the general constitutional law principle of legality and applies to all public actions. An analysis of lawfulness in administrative law thus always involves comparing the administrative action to the authorisation for that action in the relevant empowering provision. Therefore lawfulness or lack of mandate provides public decision makers with the tools to identify specifically what they are entitled to do.

In determining whether the grounds of this application warrant the grant of judicial review, this court is guided by the position of the law as variously upheld in different court decisions and precedents. Therefore, Judicial review can be granted on three grounds, namely; *Illegality; irrationality and procedural impropriety*. ***See Council of Civil Service Unions vs Minister for the Civil Service [1985] 1 A.C 374***

The applicant sought to challenge the decision of the 1st respondent which disregarded the survey report made by the Commissioner for Survey and Mapping to reinstate the original dimensions and acreage of Plot 21 Akii Bua Road measuring 0.558 acres. The 1st respondent further found that there had not been a survey and sub-division of the freehold certificate of title in the irregular creation of the 2nd respondent's certificate of title comprised in Leasehold Register Volume 2501 Folio 24 Plot M180 Akii Bua Road.

The applicant contended that the 1st respondent acted illegally and irrationally and without jurisdiction by purporting to create a Freehold title for the 2nd respondent out of the Applicant's title.

The 1st respondent has special powers under section 91 of the Land Act; **91. Special Powers of Registrar**

(1) *Subject to the Registration of Titles Act, the registrar shall, without referring a matter to a court or a district land tribunal, have power to take such steps as are necessary to give effect to this Act, whether by endorsement or alteration or cancellation of certificates of title, the issue of fresh certificates of title or otherwise.*

(2) *The registrar shall, where a certificate of title or instrument—*

(a) is issued in error;

(b) contains a misdescription of land or boundaries;

(c) contains an entry or endorsement made in error;

(d) contains an illegal endorsement;

(e) is illegally or wrongfully obtained; or

(f) is illegally or wrongfully retained,

call for the duplicate certificate of title or instrument for cancellation, or correction or delivery to the proper party.

The lawfulness or legality of the applicant may not be in dispute but the exercise of power is what is being subjected to challenge. To what extent should the 1st respondent exercise power against other technical offices like surveys and mapping department?

The Commissioner Surveying and Mapping is responsible for all the surveys and mapping and no land title is complete without the deed plans demarcating the size of the land and indeed the 1st respondent cannot never exercise the power so vested without the assistance of other technical or expertise of other players like the Surveys and Mapping department. This complementarity enables the 1st respondent to exercise the special powers given under the Land

Act. The discretionary power which is to be exercised as the special powers under section 91 of the Land Act without reference to purpose must be exercised in accordance with such implied purposes as the courts attribute to the general legal framework of land laws. ***See Rowling v Takaro Properties Ltd [1975] N.Z.L.R, 62 (NZCA)***

The 1st respondent has no power to exceed powers expressly and impliedly conferred on the office by disregarding the expertise of other players without a due process to establish the correctness of what had been done by that office. It is erroneous to make finding on a technical area of surveying and mapping without involving that office or the persons concerned. The exercise of power does not mean the Commissioner Land Registration should ‘bulldoze’ other offices because is granted special powers under the Land Act or even disregard the technical expertise in those areas. Nothing in the Land Act authorises the 1st respondent to disregard survey reports by the Commissioner Surveys and Mapping in respect of deed plans. No title can lawfully be issued where it has not been authenticated by the Commissioner of Lands and Surveys now designated Commissioner for Surveys and Mapping.

Under Part X of the Registration of Titles Act Cap 230 under the title PART IX—SURVEYS, PLANS AND BOUNDARIES it is provided as follows:

“149. Registrar may require survey of land.

On any application made or on any proposed subdivision of land under this Act, the registrar may require such surveys and plans to be made and lodged and such particulars of the boundaries and abutments to be furnished at the cost of the applicant or registered proprietor as the registrar thinks fit.

150. Surveys to be authenticated.

On and after a date to be specified by the Minister by statutory instrument all surveys required by the registrar under this Act shall be made in accordance with the requirements of the commissioner of lands and surveys, and no plans shall be accepted by the registrar unless they have been authenticated by the signature of the commissioner of lands and surveys or someone authorised by him or her in writing.”

Section 2 of the Surveys Act Cap 232 provides that; ***the Commissioner for Lands and Surveys has the legal power to order, control and carry out surveys in Uganda.***

The requirement for a certificate of title to include a deed plan upon a lawful survey is an integral part of the process of making a certificate of title and is

executable by Commissioner Land Surveys and Mapping which should never be ignored by the commissioner Land Registration in exercise of special powers under the Land Act. See **Adrabo v Madira (Civil Suit 24 of 2013) [2017] UGHCLD**

The 1st respondent usurped the power of another office-Commissioner Surveys and Mapping by sitting as an appellate body to quash the Survey Report without inviting them to clarify on its findings of fact which in my view was without jurisdiction and illegal. Any decision made in disregard of the technical survey report by the department of surveys and mapping becomes questionable in law and could rightly be challenged for irrationality.

The decision of the 1st respondent is subjected to review for irrationality. The main consideration of challenge for irrationality is whether the power which the 1st respondent as a decision-maker acted which allows a broad discretion has been properly exercised or insufficiently justified. The court therefore engages in the review of the substance of the decision or its justification. The courts have a secondary function of testing the quality of reasoning and justification by probing the quality of reasoning and ensuring that assertions are properly justified.

The material defect was identified when the 1st respondent decided to ignore a survey report and went further to find the justification by analysing the documents on file from Uganda Land Commission, this was a material defect in the decision-making process. The 1st respondent as the decision-maker should have harmonized position of the survey report instead of replacing his reasoning with other considerations to totally disregard such a technical survey report.

The question of what is a relevant or material consideration is a question of law, whereas the question of what weight to be given to it is a matter for the 1st respondent as a decision-maker. However, where undue weight is to be given to any particular consideration, this may result in the decision being held to be unreasonable, and therefore unlawful, because manifestly excessive or manifestly inadequate weight has been accorded to a relevant consideration.

See Secretary of State for Trade and Industry Ex p. BT3G Ltd Eu.L.R 325 [2001] EWCA Civ 1448

The disregard of the survey report for other pieces of evidence considered by the 1st respondent gave undue weight and informed considerations due to the possessory rights of the 2nd respondent which would not have been best considered under such proceedings presided over by the 1st respondent. The courts view is that the failure by the two offices to agree on the position to

take over the matter with glaring errors by people in the same office should have been referred to court for a final determination and decision rather than taking a one sided decision with insufficient evidence to order a forceful creation of title out of the applicant's title by directing signing of mutation forms to cause a sub-division.

The Commissioner Land Registration (1st respondent) therefore, acted illegally and irrationally when he disregarded and or failed to implement the investigation report of the Commissioner for Surveys and Mapping.

Whether the 1st respondent acted illegally, irrationally, without jurisdiction and with procedural impropriety during the public hearings and in arriving at a wrong decision?

The applicant's counsel submitted on the illegality and irrationality of the 1st respondent in the manner of conducting, and in exceeding his powers during, the public hearings where he departed from the remit given to him by the Minister to act on a report by the Commissioner for Surveys and Mapping which showed that Plot M180 was unlawfully created and instead proceeded to consider and determine possessory rights claimed by either party. He acted *ultra vires*.

Counsel contended that the 1st respondent acted with procedural impropriety. After the public hearings ended the process the 1st respondent sought for and relied on documents availed to him at his request by the Uganda Land Commission. The applicant was never availed copies of these documents nor did the applicant have an opportunity to subject the documents to examination and scrutiny and make submissions on them to the 1st respondent. The letter from the 1st respondent requesting Uganda Land Commission to avail him documents dated 19th January 2022 was copied to the applicant's counsel but the applicant maintains that it was never served with the letter nor was its counsel. The documents however became the basis of the 1st respondent's decision without affording the Applicant a right to rebut the documents.

The 2nd respondent's counsel submitted that 'directive' of the Minister of Lands and the report from the Commissioner Surveys and Mapping. The 1st Respondent was being called upon to do two things: (a) reinstate the original dimensions and acreage of Plot 21 Akii Bua Road measuring 0.558 hectares; and (b) erase Plot M180 from the cadastral map.

The scope of the 1st Respondent's powers under section 91 were discussed extensively by the Supreme Court in the case of **Hilda Wilson Namusoke & Others v. Owalla's Home Investment Trust (E.A) Limited & Another Civil Appeal No. 15 of 2017** also relied on by the Applicant, which actually emphasized that it is the 1st Respondent with the power to cancel certificates of title issued illegally or in error.

According to 2nd respondent's counsel, the 1st Respondent is not subject to or bound by the instruction of the Minister of Lands or the reports of the Commissioner Surveys and Mapping in exercising its statutory powers under the Land Act. There is no law to that effect. What the law requires is for the 1st Respondent to conduct a hearing. This negates any suggestion that the 1st Respondent must follow the directives of the Minister of Lands.

Therefore, if the 1st Respondent were to simply 'implement' the directive of the Minister or the report of the Commissioner Surveys and Mapping and proceed to cancel the 2nd Respondent's certificate of title on that basis, that is what would, in fact, amount to acting illegally, irrationally and ultra vires - outside the confines of the Land Act and the Registration of Titles Act.

Therefore, rather than merely alleging that the 1st Respondent acted with procedural impropriety, the Applicant must show that the 1st Respondent, in arriving at the decision he did, acted outside the governing law and procedure.

However, as can be seen from the procedural steps above, the law does not require the 1st Respondent to restrict himself to the documents presented by the parties or to first require that the parties make submissions on each document before the same can be relied on. On the contrary, **Section 91(8) (c)** of the **Land Act** expressly states that the 1st Respondent is not bound to comply with the rules of evidence applicable in a court of law when reaching a decision.

As such, that the 1st Respondent relied on documents from the Uganda Land Commission as part of the evidence in reaching his decision does not constitute procedural impropriety in this case and therefore does not suffice as a ground for judicial review. In any case, the evidence adduced both by the 1st and 2nd Respondents demonstrates that the impugned documents from the Commission were not solicited for or applied in bad faith and did not prejudice the Applicant in any way as can be deduced from the following facts.

Additionally, the Applicant has not demonstrated by evidence or even argument that the said documents were inauthentic, irrelevant to the determination of the suit, or prejudicial in any way. We submit that it is not sufficient for the Applicant to simply argue that the 1st Respondent relied on an additional document whose information was already on the record and only requested for confirmation of a fact that is not even in contention.

Analysis

An applicant who wishes to succeed in an application for judicial review must therefore as a matter of law, plead and prove that the decision complained of was arrived at either illegally, irrationally or there was procedural impropriety implying, flouting of well-known procedure in that regard.

In the case of ***R v Lord President of the Privy Council, ex parte Page [1993] AC 682*** Lord Browne-Wilkinson noted;

“The fundamental principle (of judicial review) is that the courts will intervene to ensure that the powers of a public decision-making bodies are exercised lawfully. In all cases...this intervention...is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a wednesbury sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is wednesbury unreasonable, he is acting ultra-vires his powers and therefore unlawful.”

The applicant contended that the 1st respondent in the decision-making process considered information from Uganda Land Commission which was never availed to the applicant to assail or challenge the content or genuineness. It was the applicant’s contention that the 1st respondent acted with procedural impropriety. After the public hearings ended the process the 1st respondent sought for and relied on documents availed to him at his request by the Uganda Land Commission. The applicant was never availed copies of these documents nor did the applicant have an opportunity to subject the documents to examination and scrutiny and make submissions on them to the 1st respondent.

The 1st respondent had a duty to avail the parties with the documents that were sought from Uganda Land Commission and invite them to make any

comment or submission or representation about them. Procedural fairness requires that persons directly affected by the proposed decision and proceedings be given an opportunity or adequate notice of what may form or likely influence the final decision. There is a presumption that procedural fairness is required whenever the exercise of power adversely affects any party's rights.

Article 42 of the Constitution provides for a right to fair and just treatment, which is basis of judicial review challenge in Uganda. This should have involved a disclosure of any such information which the 1st respondent would have encountered from Uganda Land Commission. It is indeed true that the information from Uganda Land Commission would have required the applicant or any other party to clarify or expound on it. The 1st respondent received new facts and the applicant had to be given an opportunity to make representations to the new evidence or facts received from Uganda Land Commission. It did not matter that the same was within their knowledge as the 2nd respondent's counsel contended in their submission.

This court finds that the 1st respondent exercised the powers conferred unlawfully and unfairly by relying on the evidence from Uganda Land Commission without allowing the applicant to either challenge or accept the same. The same information clearly formed the basis of the final decision made by the 1st respondent.

What remedies are available to the parties?

I therefore find and do grant the following order;

- 1. An Order of Certiorari doth issue quashing the decision of the 1st Respondent dated 31st May 2022 requiring a sub division of the land comprised in the applicant's freehold certificate of title for land comprised in Freehold Register Volume 220 Folio 24 Plot 21 Akii Bua Road, Kampala to be carried out to create a separate plot in favour of the 2nd respondent either voluntarily by the applicant surrendering its certificate of title and executing mutation forms or by consequential order of the 1st respondent.*

I decline to issue an order of mandamus to require the 1st respondent to forthwith cancel the certificate of title in respect of the land comprised in Leasehold Register Volume 2501 Folio 25 Plot M180 Off Akii Bua Road, Kampala and also to require the 1st respondent to enter the correct area in the applicant's title as 0.558 hectares.

This is because there are serious issues to be determined in a proper suit to determine the rights of the parties and to correct the alleged errors or mistakes in a suit to conclusively deal with the challenges on this suit land.

Each party should bear their own costs.

I so order.

Ssekaana Musa

Judge

14th April 2023